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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL RICHARD LYNCH AND  
STEPHEN KEITH CHAMBERLAIN

Defendants.

CASE NO. 3:18-cr-00577-CRB

**DEFENDANT STEPHEN  
CHAMBERLAIN'S NOTICE OF MOTION  
AND MOTION FOR ISSUANCE OF  
SUBPOENAS PURSUANT TO FEDERAL  
RULE OF CRIMINAL PROCEDURE 17(c)  
AND LETTERS ROGATORY PURSUANT  
TO 28 U.S.C. § 1781 RELATING TO  
DAUD KHAN AND PAUL MORLAND;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

Filed Concurrently with DECLARATION OF  
GARY S. LINCENBERG; [PROPOSED]  
ORDER

Date: November 24, 2021

Time: 1:30 p.m.

Crtrm.: 6

Assigned to Hon. Charles R. Breyer

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD IN THIS ACTION:**

2 PLEASE TAKE NOTICE that on November 24, 2021, or as soon thereafter as the matter  
3 may be heard, defendant Stephen Chamberlain, by and through counsel, will and hereby does  
4 move this Honorable Court for an order authorizing the Issuance of Subpoenas *Duces Tecum*  
5 pursuant to Federal Rule of Criminal Procedure 17(c)(1) and Local Rule 17-2(a), and for the  
6 Issuance of Letters Rogatory pursuant to 28 U.S.C. § 1781. The proposed subpoenas are attached  
7 as Exhibits 1, 3, 4, 5, 7, and 9 of the concurrently filed Declaration of Gary S. Lincenberg, and the  
8 proposed letters rogatory are attached as Exhibits 2, 6, and 8 of the same.

9  
10 DATED: November 1, 2021

Gary S. Lincenberg  
Bird, Marella, Boxer, Wolpert, Nessim,  
Drooks, Lincenberg & Rhow, P.C.

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13 By: 

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Gary S. Lincenberg  
15 Attorneys for Defendant Stephen Keith  
Chamberlain  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

Defendant Stephen Chamberlain respectfully requests that the Court issue subpoenas and letters rogatory to Daud Khan, Paul Morland, and their prior relevant employers pursuant to Federal Rule of Criminal Procedure 17(c)(1), Local Rule 17-2(a), and 28 U.S.C. § 1781. The proposed subpoenas and letters rogatory are attached to the accompanying Declaration of Gary S. Lincenberg (“Lincenberg Decl.”) as Exhibits 1 through 9. These discovery requests seek relevant, specific, and admissible evidence, and are therefore authorized by *United States v. Nixon*, 418 U.S. 683, 700 (1974), as well as central to Chamberlain’s defense to the charges contained in the Second Superseding Indictment. (ECF No. 21) (“SI”).

**I. SUMMARY OF ARGUMENT**

The SI alleges that Chamberlain and his co-defendant, Dr. Michael Lynch (collectively, “Defendants”), along with others, defrauded purchasers and sellers of Autonomy securities, including, specifically, Hewlett-Packard Company (“HP”) in connection with its purchase of Autonomy Corporation plc (“Autonomy”) in August 2011. SI ¶¶ 19, 21. As they did in the earlier *United States v. Hussain* trial, the government appears likely to rely heavily on testimony from UK-based securities analysts Daud Khan and Paul Morland in connection with its claim that the market was deceived by Autonomy’s financial statements and earnings calls. Khan and Morland have each already testified in *three* separate proceedings relating to HP’s acquisition of Autonomy: the *Hussain* trial, UK civil trial<sup>1</sup>, and UK Financial Reporting Council (“FRC”) proceedings against Deloitte.<sup>2</sup> In each of these proceedings, Khan and Morland held themselves out as independent and objective analysts who were deceived by Autonomy’s alleged misrepresentations.

But the discovery suggests the opposite: the two analysts were neither objective nor misled. Documents produced to Chamberlain in discovery indicate that Khan and Morland

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<sup>1</sup> Autonomy Corp. Ltd. v. Lynch and Hussain, Claim No. HC-2015-001324 (High Court of Justice, Chancery Division, London, U.K.), referred to as “UK civil trial.”

<sup>2</sup> Khan and Morland were the sole external fact witnesses to present evidence in the FRC proceedings.

1 improperly shared and discussed confidential research and rating decisions with one another;  
 2 actively sought confidential internal information about Autonomy; engaged in concerted and  
 3 improper efforts to depress Autonomy's share price for their and their short-selling clients'  
 4 benefit; and improperly shared internal compliance matters with persons outside a regulated  
 5 organization. Further, these documents make clear that Khan and Morland were vehemently  
 6 antagonistic towards Autonomy and its management. The requested discovery is needed to  
 7 demonstrate this misconduct, which Chamberlain believes will directly contradict the allegations  
 8 against him.

9 More specifically, these documents show that Khan and Morland (who worked for separate  
 10 companies) colluded with one another. They led a group of "bear" analysts (i.e., analysts who  
 11 predicted that Autonomy's stock would decline) who closely coordinated their coverage of  
 12 Autonomy. They peddled a negative view of Autonomy's growth prospects to other analysts,  
 13 investors, and ultimately to HP. Additionally, the documents reveal that Khan and Morland were  
 14 engaged in a long-running *personal* feud with Autonomy executives. They were closely aligned  
 15 with "short sellers" who stood to profit handsomely if Autonomy's share price decreased. Indeed,  
 16 the documents show that Khan and Morland made sport of "Autonomy bashing,"<sup>3</sup> that Khan  
 17 likened Dr. Lynch to "Hitler,"<sup>4</sup> that Khan boasted about being like an "AK 47,"<sup>5</sup> and that Khan  
 18 believed taking down Autonomy was his "ticket" to success.<sup>6</sup> In sum, these documents contradict  
 19 key aspects of Khan and Morland's prior testimony, indicate that they were not misled by  
 20 Autonomy management, and show that their behavior was unethical, likely a breach of their UK  
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22  
 23 <sup>3</sup> See Lincenberg Decl. Ex. 10 (Email from Paul Morland to Daud Khan (Sep. 5, 2009, 14:25))  
 at 3.

24 <sup>4</sup> See Lincenberg Decl. Ex. 11 (Chat Transcript between Daud Khan and Bram Cornelisse (Oct.  
 25 12, 2010, 16:27)) at 1.

26 <sup>5</sup> See Lincenberg Decl. Ex. 12 (Chat Transcript between Daud Khan and Sherief Bakr (Apr. 28,  
 2009, 18:24)) at 6.

27 <sup>6</sup> See Lincenberg Decl. Ex. 13 (Chat Transcript between Daud Khan and Peter McNally (Jan.  
 28 25, 2010, 15:30)) at 2.

1 regulatory obligations, and potentially criminal.<sup>7</sup>

2 The documents referenced above were produced to the government by Khan's former  
3 employer, J.P. Morgan Chase & Co. ("the J.P. Morgan documents"). The J.P. Morgan documents  
4 at issue are contained within a series of productions made by J.P. Morgan to the government  
5 between 2015 and 2018. Two of these productions related specifically to Khan, and consist of  
6 approximately 1000 of Khan's electronic communications covering the period from January 1,  
7 2008 to August 31, 2011.<sup>8</sup> The government apparently obtained emails from only one of Khan's  
8 J.P. Morgan accounts from this period that hit on one or more of the following search terms:  
9 "Lynch," "Hussain," "Kanter," or "Autonomy\*."

10 A party seeking pretrial production of documents "must clear three hurdles: (1) relevancy;  
11 (2) admissibility; (3) specificity." *Nixon*, 418 U.S. at 700. Chamberlain's request meets these three  
12 requirements. The Rule 17(c) subpoenas and letters rogatory requested here are necessary to  
13 obtain specific relevant and admissible evidence relating to the SI's allegations, including by  
14 establishing that these analysts (and the market more broadly) were not misled by Autonomy's  
15 financial statements (which Mr. Chamberlain helped prepare). Indeed, the emails produced to date  
16 are only the tip of the iceberg. First, "Chamberlain" was not even a search term that the  
17 government required J.P. Morgan to use to identify documents to be produced. Second, it is  
18 apparent from the documents produced that Khan used other email addresses while employed by  
19 J.P. Morgan aside from the email address from which the production was made. Third, the

20 \_\_\_\_\_  
21 <sup>7</sup> Khan and Morland were both subject to UK regulations that required them to, among other  
22 things, act with integrity and observe proper standards of market conduct. As research analysts,  
23 they were also prohibited from becoming involved in activities (other than the preparation of  
24 investment research) where such involvement was inconsistent with the maintenance of their  
25 objectivity. To the extent that Khan and Moreland procured confidential inside information, they  
26 may have also breached criminal prohibitions against insider dealing.

27 <sup>8</sup> Khan was on gardening leave from J.P. Morgan between April 2011–August 2011, so the  
28 production does not include any of his correspondence after April 2011. *See* Lincenberg Decl. Ex.  
14 (Excerpt of Third Witness Statement of Daud Khan, *Autonomy Corp. Ltd. v. Lynch*, Claim No.  
HC-2015-001324 (High Court of Justice, Chancery Division, London, U.K.)) at § 10; *See*  
Lincenberg Decl. Ex. 15 (Excerpt of Daud Khan UK Testimony, Day 14, *Autonomy Corp. Ltd. v.*  
*Lynch*, Claim No. HC-2015-001324 (High Court of Justice, Chancery Division, London, U.K.)) at  
19:22–20:2.



1 government has not produced any communications from Khan’s prior or subsequent employers,  
 2 even though Khan’s coverage of Autonomy (and subsequent communications with HP) was not  
 3 limited to the 2008 to 2011 timeframe.<sup>9</sup> Fourth, while there are extensive relevant communications  
 4 between Khan and Morland from January 2009 to February 2010, inexplicably there are none  
 5 before or after this period. Fifth, the search term used to identify Autonomy-related  
 6 communications (“Autonomy\*”) would have missed communications referencing Autonomy by  
 7 its common abbreviations “AU,” “AUT,” or stock ticker symbol “AUTN.” Sixth, the government  
 8 has not produced *any* communications from Morland’s employers, so that, other than Morland  
 9 emails produced in the Khan production, there has been no production of emails from this central  
 10 witness. Seventh, the production does not include any emails or text messages from either Khan or  
 11 Morland’s personal accounts, despite clear evidence in the production that Khan used his personal  
 12 Gmail account for business purposes (and that Khan was on leave from J.P. Morgan from April  
 13 2011 through September 2011—when the Autonomy acquisition was announced—and therefore  
 14 surely would have relevant communications on his personal accounts from this period).

15 To remedy this critical deficiency, Mr. Chamberlain seeks the issuance of subpoenas to six  
 16 entities, and related letters rogatory, to obtain documents which will allow counsel to effectively  
 17 rebut the analysts’ testimony and the government’s claim that the Defendants misled investors and  
 18 HP.

## 19 **II. BACKGROUND**

### 20 **A. Allegations**

21 The government alleges that Chamberlain, the former Vice President of Finance at  
 22 Autonomy, schemed with others to present misleading information in its published financial  
 23 statements which were shared with investors and analysts. *See* SI ¶¶ 5, 13, 14, 18. The government  
 24

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25 <sup>9</sup> Khan was employed at investment bank Cazenove beginning in 2006. Cazenove was acquired by  
 26 J.P. Morgan in 2010, and Khan remained with the company through September 2011. *See*  
 27 Lincenberg Decl. Ex. 16 (Excerpt of First Witness Statement of Daud Khan, *Autonomy Corp. Ltd.*  
 28 *v. Lynch*, Claim No. HC-2015-001324 (High Court of Justice, Chancery Division, London, U.K.))  
 at § 4. However, Khan testified that he began covering Autonomy in 2001. *Id.* at §§ 7–10, and he  
 continued reporting on Autonomy’s performance and provided information to HP after the  
 acquisition in 2011. *See* Lincenberg Decl. Ex. 15 at 5:17–21.

1 also alleges that the Defendants intimidated and pressured analysts like Khan and Morland who  
 2 questioned Autonomy's performance. *Id.* at ¶¶ 22(c), 22(j).

### 3 **B. Analyst Testimony**

4 Daud Khan began covering Autonomy in 2001, and worked as an analyst for various  
 5 investment firms (including Cazenove) from 2006 to 2011 (which was acquired by J.P. Morgan in  
 6 2010), and Berenberg from 2011 to 2015.<sup>10</sup> Khan continued to report on Autonomy after it was  
 7 acquired by HP in 2011, issuing a research note in March 2013 about Autonomy and HP.<sup>11</sup>

8 Morland started covering Autonomy in 2005 when he was at Société Générale. He then  
 9 moved to Arbuthnot Securities in late 2005, where he continued to report on Autonomy. Morland  
 10 also covered Autonomy intermittently from July 2008 to June 2010 while he worked at Astaire  
 11 Securities, and from June 2010 to June 2013 while at Peel Hunt.<sup>12</sup> Both Morland and Khan  
 12 provided information to HP about Autonomy's financial reporting after the acquisition.<sup>13</sup>

13 In the *Hussain* trial, the government presented Khan and Morland as objective,  
 14 independent market observers who found that Autonomy management presented deceptive  
 15 information regarding (i) revenue from hardware sales; (ii) Original Equipment Manufacturer  
 16 ("OEM") revenue; and (iii) cost allocation relating to the launch of its new Structured Probabilistic  
 17 Engine ("SPE") product in Q3 2009, among other things.<sup>14</sup> They claimed that this inflated  
 18 financial information led to an inflated share price.<sup>15</sup> Like Hussain, Chamberlain is charged with  
 19 providing false information to analysts. *See* SI ¶ 22(c). The government alleges that Chamberlain

20 <sup>10</sup> Lincenberg Decl. Ex. 16 at § 4; Lincenberg Decl. Ex. 14 at § 11.

21 <sup>11</sup> *See* Lincenberg Decl. Ex. 17 (Daud Khan, "*Confessions of an Autonomy Bear*," BERENBERG  
 22 BANK, Mar. 6, 2013).

23 <sup>12</sup> Lincenberg Decl. Ex. 18 (Excerpt of First Witness Statement of Paul Morland, *Autonomy*  
 24 *Corp. Ltd. v. Lynch*, Claim No. HC-2015-001324 (High Court of Justice, Chancery Division,  
 London, U.K.)) at §§ 5–8.

25 <sup>13</sup> *See, e.g.,* Lincenberg Decl. Ex. 19 (Email from Robert Binns to Paul Morland (Dec. 6, 2012,  
 09:03)) at 1; Lincenberg Decl. Ex. 15 at 5:17–21.

26 <sup>14</sup> Lincenberg Decl. Exs. 20 and 21 (Trial Tr. *Passim*, *United States v. Hussain*, No. CR 16-462  
 27 CRB (N.D. Cal. March 27, 2018 and Apr. 13, 2018)).

28 <sup>15</sup> *See id.*

1 was responsible for preparing Autonomy's financial statements, which were shared with analysts  
 2 and investors, and that Autonomy and its executives, "intimidate[ed] and pressure[ed] analysts ...  
 3 who raised questions about or openly criticized Autonomy's financial practices and performance."  
 4 See SI ¶ 22(j).<sup>16</sup> The government will likely rely on Khan and Morland to prove these allegations,  
 5 and without the full picture of their communications, Chamberlain will be hampered in his ability  
 6 to challenge the government's evidence.

### 7 **C. The J.P. Morgan Discovery**

8 The J.P. Morgan documents include approximately 270 emails between Morland and  
 9 Khan. These emails contradict key aspects of Khan and Morland's prior testimony. They negate  
 10 the government's central contention that Khan and Morland were disinterested, passive observers  
 11 who, along with other market participants, were duped by the Defendants. Yet these emails are  
 12 inexplicably limited to a narrow timeframe: January 2009 to February 2010.

13 A review of all of the limited documents that were produced shows Khan and Morland (a)  
 14 had knowledge of the very accounting practices which they claimed Autonomy concealed; (b)  
 15 bore significant personal animus toward Autonomy and Autonomy management; (c) led a group  
 16 of analysts who closely coordinated their research, improperly solicited and shared confidential  
 17 information, coordinated ratings changes, and colluded in their efforts to attack Autonomy's  
 18 management and depress its share price; and (d) were driven by personal agendas and worked with  
 19 short sellers who would benefit from a price drop. The review also reveals the existence of related,  
 20 relevant communications that have not been produced.

#### 21 **a. Knowledge of Autonomy Accounting Practices**

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23 <sup>16</sup> See also Lincenberg Decl. Ex. 22 (Government's Opening Statement, *United States v.*  
 24 *Hussain*, No. CR 16-462 CRB (N.D. Cal. Feb. 26, 2018)) at 20:23-21:7. ("You will hear about the  
 25 importance of revenue from some of the analysts who followed Autonomy. The analysts had the  
 26 job of scouring the public domain for information about Autonomy, reading its financial  
 27 statements, reading news reports, talking to Mr. Hussain, talking to Mr. Lynch, talking to anybody  
 28 they could find who had information about the company, and then preparing reports or research  
 that projected how Autonomy was going to do, what was its revenue going to be. And it sold those  
 reports to investors who made investment decisions on whether to buy or sell Autonomy  
 securities.")

1 Most pertinent to the government’s allegations against Chamberlain, the J.P. Morgan  
 2 documents reveal that Khan and other analysts discussed specific accounting practices that the  
 3 government later claimed Autonomy concealed.<sup>17</sup> These emails directly contradict the  
 4 government’s theory that Autonomy misled the market regarding the composition of its revenue.<sup>18</sup>

5 Moreover, while Chamberlain does not yet have custodial documents from Morland,  
 6 discovery produced to date from another financial institution includes an email that reflects  
 7 Morland closely followed and was aware of Autonomy’s hardware sales.<sup>19</sup> This undermines the  
 8 government’s closing argument in the *Hussain* trial that he was deceived in this regard.<sup>20</sup>

#### 9 **b. Personal Animus**

10 Khan testified that he did not have “negative or positive feelings” about members of  
 11 Autonomy management,<sup>21</sup> and that there was never anything “personal” between himself and  
 12 Autonomy management.<sup>22</sup> The emails show this was a lie. Indeed, in April 2009, Khan discussed  
 13 with Sherief Bakr, an analyst at Citigroup Global, how Khan “[took] pleasure in windhingung [*sic*]  
 14

15 <sup>17</sup> See, e.g., Lincenberg Decl. Ex. 23 (Email from Daud Khan to Vijay Anand (Jan. 27, 2010,  
 16 14:03)) at 1 (discussing the breakdown of Autonomy’s OEM revenue); Lincenberg Decl. Ex. 24  
 17 (Email from Daud Khan to John Gladwyn (May 1, 2009, 15:25)) at 1 (discussing the nature of  
 18 Autonomy’s OEM business).

18 <sup>18</sup> See also Lincenberg Decl. Ex. 25 (Email from Paul Morland to Daud Khan and Roger Phillips  
 19 (Sep. 9, 2009, 15:35)) at 1 (discussing costs relating to the SPE product).

19 <sup>19</sup> See, e.g., Lincenberg Decl. Ex. 26 (Email from Paul Morland to Michael Briest (July 23, 2010,  
 20 07:21)) at 1 (“I know you didn’t consider the hardware sale material [on Autonomy’s earnings  
 21 call] yesterday,” and added, “[t]here are only two ways to look at this. Either all your growth is  
 22 coming from hardware or license sales are in reverse, [s]o I would say it is wrong to ignore  
 23 hardware sales”).

23 <sup>20</sup> See Lincenberg Decl. Ex. 27 (Government’s Closing Argument, Transcript of Record, *United*  
 24 *States v. Hussain*, No. CR 16-462 CRB (N.D. Cal. Apr. 23, 2018)) at 5775:17-20 (“Mr. Morland  
 25 said that if he’d known about the scale of the hardware sales, that would have had a massive  
 26 impact—negative impact on his evaluation of the company.”).

25 <sup>21</sup> See Lincenberg Decl. Ex. 20 (Excerpt of Daud Khan Testimony, Transcript of Record, *United*  
 26 *States v. Hussain*, No. CR 16-462 CRB (N.D. Cal. Mar. 27, 2018)) at 3029:20–22.

26 <sup>22</sup> See Lincenberg Decl. Ex. 28 (Excerpt of Daud Khan UK Testimony, Day 14, *Autonomy Corp.*  
 27 *Ltd. v. Lynch*, Claim No. HC-2015-001324 (High Court of Justice, Chancery Division, London,  
 28 U.K.) at 56:11–16.

1 Lynch,” and relished in being a “thorn in [Lynch’s] side ... then a dagger ... then an **ak 47**.”<sup>23</sup>  
 2 Khan also expressed joy when Autonomy’s stock performed badly, explaining how he was “over  
 3 the moon,” and even noting that he was “maybe being too hopeful but [he could] see an image of a  
 4 hitler moment for Mike [Lynch], where his generals tell him the war is lost and that he has to step  
 5 down.”<sup>24</sup> These emails show that Khan was not, as the government claims, an objective analyst  
 6 whose views were representative of “market understanding.”

7 Morland was similarly hostile towards Autonomy, noting, for example, that he was looking  
 8 forward to “Autonomy bashing” with Khan.<sup>25</sup> Since the government has not obtained any  
 9 communications from Morland’s former employers, most of Morland’s communications are  
 10 missing. But the emails that have been produced, like the example above, reveal Morland’s  
 11 contempt for Autonomy.

#### 12 **c. Personal Gain**

13 Khan previously testified that he was not “working with” short sellers or advancing their  
 14 interests,<sup>26</sup> that his coverage of Autonomy did not have “any material impact on [his] pay or  
 15 reputation,” and that he had no “agenda” in his reporting.<sup>27</sup> The J.P. Morgan documents flatly  
 16 contradict this. For example, in a communication with Farrington Capital<sup>28</sup>, investor Bram  
 17 Cornelisse told Khan that he was buying back more Autonomy stock, but that he would “keep a  
 18 position.” Khan replied, “well [I] hope you have made some money finally. . . next short to look at  
 19

20 <sup>23</sup> See Lincenberg Decl. Ex. 12 at 6 (emphasis added).

21 <sup>24</sup> Lincenberg Decl. Ex. 11 at 1.

22 <sup>25</sup> Lincenberg Decl. Ex. 10 at 3.

23 <sup>26</sup> Short sellers are generally investors who make trades designed to profit when a company’s  
 24 shares decrease. An analyst’s “sell” recommendation may drive a company’s share price down,  
 and therefore benefit short sellers who profit from the decrease. See Lincenberg Decl. Ex. 15 at  
 15:16–22.

25 <sup>27</sup> See Lincenberg Decl. Ex. 20 (Excerpt of Daud Khan Testimony, Transcript of Record, *United*  
 26 *States v. Hussain*, No. CR 16-462 CRB (N.D. Cal. Mar. 27, 2018)) at 3046:1–14; Lincenberg  
 Decl. Ex. 14 at §§ 4–5.

27 <sup>28</sup> Farrington Capital was a hedge fund which, according to Khan, shorted Autonomy’s stock.  
 28 Lincenberg Decl. Ex. 15 at 14:2–8.

1 is Software AG . . . .”<sup>29</sup> In another conversation with Khan in January 2011, Cornelisse told Khan  
 2 that he was thinking of “**shorting some more**,” and explained that he was “fully out at 1250, then  
 3 resorted a little at 1400 with the intention to do more at 1600.”<sup>30</sup> These emails show Khan’s close  
 4 ties to an investor shorting Autonomy and contradict Khan’s testimony that he was not working on  
 5 behalf of short sellers. Central to the government’s attempt to prove deception is Khan’s testimony  
 6 that he is objective and has no agenda. To the contrary, in emails, Khan stated that he was “hoping  
 7 Autonomy blows up and its [sic] my ticket outta here.”<sup>31</sup> In showing that Khan was personally  
 8 banking on Autonomy’s failure, the emails undermine the government’s proof.

#### 9 **d. Collusion**

10 Both Khan and Morland denied ever working with either each other or other analysts when  
 11 preparing research and reports about Autonomy. Khan testified that he and Morland were  
 12 “competitors,” not collaborators, and that he “didn’t have access to other people’s research  
 13 notes.”<sup>32</sup> Morland also testified that he did not generally read other analysts’ materials.<sup>33</sup>

14 The J.P. Morgan documents, however, show a staggering amount of collusion. Khan and  
 15 Morland regularly shared confidential information and coordinated their reporting.<sup>34</sup> They created  
 16 an “Autonomy Discussion Group” with two other analysts, Kevin Ashton at Canaccord, and Roger  
 17

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18 <sup>29</sup> Lincenberg Decl. Ex. 11 at 2.

19 <sup>30</sup> Lincenberg Decl. Ex. 29 (Chat Transcript between Bram Cornelisse and Daud Khan (Jan. 11,  
 20 2011, 15:51)) at 1 (emphasis added). *See also* Lincenberg Decl. Ex. 30 (Email from Daud Khan to  
 21 Paul Morland (July 29, 2009, 14:55)) at 1 (Khan says, “just spoke with [L]one [P]ine – they would  
 be happy to support a deal.”).

22 <sup>31</sup> Lincenberg Decl. Ex. 13 at 2.

23 <sup>32</sup> Lincenberg Decl. Ex. 28 at 79:16–21; Lincenberg Decl. Ex. 20 (Excerpt of Daud Khan  
 Testimony, Transcript of Record, *United States v. Hussain*, No. CR 16-462 CRB (N.D. Cal. Mar.  
 24 27, 2018)) at 3062:19–23.

25 <sup>33</sup> Lincenberg Decl. Ex. 31 (Excerpt of Paul Morland UK Testimony, Day 13, *Autonomy Corp.*  
*Ltd. v. Lynch*, Claim No. HC-2015-001324 (High Court of Justice, Chancery Division, London,  
 26 U.K.)) at 5:18–20.

27 <sup>34</sup> *See, e.g.*, Lincenberg Decl. Ex. 32 (Email from Daud Khan to Paul Morland (Jan. 27, 2009,  
 15:27)) at 1 (Khan explained his “proprietary” analysis to Morland in calculating Autonomy’s  
 28 cumulative cash deficit).

1 Phillips at Evolution Securities, to coordinate (improperly) negative coverage about Autonomy's  
 2 stock.<sup>35</sup> Khan, Morland, Ashton, and Phillips swapped theories about Autonomy and strategized  
 3 about how to persuade other analysts and investors that Autonomy's share price was over-valued  
 4 while maintaining an appearance of independence.<sup>36</sup> Morland and Khan even discussed  
 5 confidential changes in recommendations.<sup>37</sup> Khan and Morland even tried to hide the extent of  
 6 their communications.<sup>38</sup> In addition, the J.P. Morgan documents reveal that Khan solicited  
 7 confidential information from internal sources and shared it with a select group of analysts,  
 8 including Morland and David Toms at Numis.<sup>39</sup>

### 9 **III. ADDITIONAL MATERIAL SOUGHT**

10 The J.P. Morgan documents reveal significant gaps in the government's production to date.  
 11 In particular, missing from the government's production are (1) additional emails and chats from  
 12 Khan's tenure at J.P. Morgan; (2) communications from Khan's subsequent employers; (3)  
 13 communications from Morland's employers; and (4) communications from Khan and Morland's  
 14 personal email accounts and devices.

15 For instance, the J.P. Morgan documents include emails between Morland and Khan only  
 16 from January 2009 to February 2010, even though other documents in the production extend  
 17 through August 2011 (and Khan left J.P. Morgan in September 2011, after having been on leave  
 18 since April 2011). Both Morland and Khan testified that they remained in contact beyond  
 19 February 2010, including in July 2010 when Khan sent Morland information relating to

20  
 21 <sup>35</sup> See Lincenberg Decl. Ex. 33 (Email from Daud Khan to Kevin Ashton (Jan. 22, 2010, 11:24)) at 1.

22 <sup>36</sup> See, e.g., Lincenberg Decl. Ex. 34 Email from Paul Morland to Daud Khan and Roger Phillips  
 23 (Jan. 22, 2010, 13:02)) at 1.

24 <sup>37</sup> See, e.g., Lincenberg Decl. Ex. 35 (Email from Daud Khan to Paul Morland, Roger Phillips and  
 Kevin Ashton (Jan. 22, 2010, 12:48)) at 1; Lincenberg Decl. Ex. 24 at 1.

25 <sup>38</sup> See, e.g. Lincenberg Decl. Ex. 36 (Email from Paul Morland to Daud Khan (Sep. 21, 2009,  
 26 17:41)) at 1 (discussing keeping confidential that Khan had sent him an Autonomy internal  
 document).

27 <sup>39</sup> See Lincenberg Decl. Ex. 37 (Email from Daud Khan to David Toms and Paul Morland (May  
 28 14, 2009, 09:05)) at 1.



1 Autonomy.<sup>40</sup> Khan also testified that, “[d]uring the time from 2011 onwards I’ve had  
 2 conversations with a number of different analysts [including Morland] about the events post HP’s  
 3 announcement around the write-down.”<sup>41</sup> Thus, there are at least two years of missing  
 4 communications between Khan and Morland.

5 In addition, the government has not produced any communications from Khan’s earlier  
 6 tenure at Cazenove, nor from his subsequent employers, even though his involvement with  
 7 Autonomy was not limited to 2008 to 2011. Indeed, both Morland and Khan worked closely with  
 8 HP after HP’s write-down of Autonomy in November 2012.<sup>42</sup> Khan also testified that he was put  
 9 in contact with HP’s lawyers by Morland after the write-down.<sup>43</sup>

10 The Khan/J.P. Morgan documents all appear to have been produced from the email address  
 11 Daud.Khan@Cazenove.com (with a limited number of emails to DKHAN5@Bloomberg.net). The  
 12 production also includes several chat communications, but only where those chats were later  
 13 forwarded to the email system. Thus, it is highly likely that there are additional chats beyond those  
 14 that were forwarded by email. It is also apparent from other documents included in the J.P.  
 15 Morgan productions that Khan also used the J.P. Morgan email addresses  
 16 Daud.Khan@jpmorgan.com and Daud.Khan@JPMResearchmail.com. These email handles were  
 17 used by Khan professionally at least between April 16, 2010 and November 24, 2010.<sup>44</sup>

18 Finally, the government has not produced any communications from Khan’s personal

19 \_\_\_\_\_  
 20 <sup>40</sup> See Lincenberg Decl. Ex. 28 at 79:22–80:3.

21 <sup>41</sup> See Lincenberg Decl. Ex. 15 at 5:5–11.

22 <sup>42</sup> On November 20, 2012, HP announced a write down of Autonomy, citing Autonomy’s alleged  
 23 accounting improprieties. *See, e.g.*, Lincenberg Decl. Ex. 19 at 1 (In December 2012, Binns wrote  
 to Morland, “Thanks for your note to HP Investor Relations, and I appreciate your offer of  
 engagement. I’ll set up a call so we can better understand your input”).

24 <sup>43</sup> Lincenberg Decl. Ex. 15 at 5:17–21.

25 <sup>44</sup> See Lincenberg Decl. Ex. 38 (Email from Daud Khan to Kristopher Drankiewicz (Apr. 16,  
 26 2010, 07:44)) at 1; Lincenberg Decl. Ex. 39 (Email from Daud Khan to Leopold Arminjon (Sep. 8,  
 27 2010, 06:00)) at 1; Lincenberg Decl. Ex. 40 (Email from Daud Khan to Unknown Recipient (Sep.  
 28 8, 2010, 06:00)) at 1; Lincenberg Decl. Ex. 41 (Email from Lee Kirbach to Daud Khan and others  
 (Oct. 6, 2010, 14:57)) at 1, Lincenberg Decl. Ex. 42 (Email from Lee Kirbach to Daud Khan and  
 others (Nov. 24, 2010, 16:23)) at 1.



1 Gmail account, Daud.Khan@gmail.com. The documents produced reveal that Khan used his  
 2 personal Gmail account for work purposes on numerous occasions between at least February 2006  
 3 and January 2010.<sup>45</sup> Moreover, there are no emails to or from Khan after April 2011 in the  
 4 production sets, while Khan was on leave from J.P. Morgan pending his departure.<sup>46</sup> Emails from  
 5 this period are critical, as HP announced its intention to acquire Autonomy in August 2011. As  
 6 Khan had covered Autonomy for nearly a decade at that stage, he surely corresponded with other  
 7 analysts and investors about the impact of the acquisition.

8 Indeed, Khan was cited in an anonymous hit piece about Autonomy that circulated in  
 9 September 2011. Specifically, two former Autonomy employees, Harald Collet and Alex  
 10 Marshall, sent an anonymous email under the pseudonym “Joe Bloggs” to numerous market  
 11 participants condemning Autonomy’s business practices.<sup>47</sup> Collet and Marshall listed Khan (who  
 12 was on gardening leave at the time) at his Gmail account as a knowledgeable contact from whom  
 13 recipients could obtain further information.<sup>48</sup> The materials sought are therefore likely to further  
 14 demonstrate Khan and Morland’s concerted efforts to undermine Autonomy, and therefore are  
 15 central to defend against the government’s core allegation that the Defendants intentionally  
 16 deceived Khan, Morland and other market participants.

#### 17 **IV. APPLICABLE LEGAL STANDARDS**

##### 18 **A. Federal Rule of Criminal Procedure 17(c)**

19 Under Rule 17(c) of the Federal Rules of Criminal Procedure, which governs the issuance  
 20 of subpoenas *duces tecum* in federal criminal proceedings,

21 \_\_\_\_\_  
 22 <sup>45</sup> See, e.g., Lincenberg Decl. Ex. 43 (Email from Daud Khan to Daud Khan (Jan. 10, 2010,  
 23 21:13)) 1; Lincenberg Decl. Ex. 44 (Email from Daud Khan to Daud Khan (Jan. 18, 2010, 19:13))  
 24 at 1; Lincenberg Decl. Ex. 45 (Email from Daud Khan to Michael Lynch (Feb. 6, 2006, 22:35)) at  
 25 1. See also, a September 16, 2011 email sent by former Autonomy employees identifying issues  
 26 about Autonomy’s finances, citing Khan as a person to speak with about these concerns, and  
 27 listing Khan’s personal Gmail account (Daud.Khan@gmail.com) as his contact information. See  
 28 Lincenberg Decl. Ex. 46 (Email from Harald Collet to Alex Marshall, to (Sep. 16, 2011, 14:58)) at  
 5.

<sup>46</sup> See Lincenberg Decl. Ex. 14 at § 10.

<sup>47</sup> See Lincenberg Decl. Ex. 15 at 24:11–17.

<sup>48</sup> See Lincenberg Decl. Ex. 46 at 5.

1 A subpoena may order the witness to produce any books, papers, documents, data,  
2 or other objects the subpoena designates. The court may direct the witness to  
3 produce the designated items in court before trial or before they are to be offered in  
evidence. When the items arrive, the court may permit the parties and their  
attorneys to inspect all or part of them.

4 Fed. R. Crim. P. 17(c); *see also* Crim. L. R. 17-2(a). The “chief innovation” of Rule 17(c) is “to  
5 expedite the trial by providing a time and place before trial for the inspection of the subpoenaed  
6 materials.” *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951).

7 In *United States v. Nixon*, the Supreme Court held, in the context of a prosecution  
8 subpoena to the President of the United States, that the prosecution:

9 [M]ust show (1) that the documents are evidentiary and relevant; (2) that they are  
10 not otherwise procurable reasonably in advance of trial by exercise of due  
11 diligence; (3) that the party cannot properly prepare for trial without such  
12 production and inspection in advance of trial and that the failure to obtain such  
inspection may tend unreasonably to delay the trial; and (4) that the application is  
made in good faith and is not intended as a general “fishing expedition.”

13 418 U.S. at 699–700. In short, the party seeking production of documents “must clear three  
14 hurdles: (1) relevancy; (2) admissibility; (3) specificity.” *Id.* at 700; *see also United States v.*  
15 *Komisaruk*, 885 F.2d 490, 494 (9th Cir. 1989).<sup>49</sup>

16 In considering whether to grant a pre-trial subpoena, courts “engage[] in a ‘discretionary,  
17 case-by-case inquiry’” considering the *Nixon* factors and the purposes for which documents are  
18 sought. *United States v. Krane*, 625 F.3d. 568, 574 (9th Cir. 2010) (quoting *United States v.*  
19 *Bergeson*, 425 F.3d 1221, 1225 (9th Cir. 2005)).

20 \_\_\_\_\_  
21 <sup>49</sup> To the extent that the admissibility prong of the *Nixon* standard requires a defendant to  
22 demonstrate that the evidence sought will be admissible at trial *before* he has had an opportunity  
23 to review and evaluate such evidence, the standard arguably runs afoul of the “Sixth Amendment  
24 guarantee that an accused have compulsory process to secure evidence in his favor.” *In re Martin*  
25 *Marietta Corp.*, 856 F.2d 619, 621 (4th Cir. 1988) (citing *California v. Trombetta*, 467 U.S. 479,  
26 485 (1984)). As a result, some courts have ruled that a criminal defendant seeking material from a  
27 third party need only show that the requested items are “(1) reasonable, construed as ‘material to  
28 the defense,’ and (2) not unduly oppressive for the producing party to respond.” *United States v.*  
*Tucker*, 249 F.R.D. 58, 66 (S.D.N.Y. 2008); *see also United States v. Rajaratnam*, 753 F. Supp. 2d  
317, 321 n.1 (S.D.N.Y. 2011) (“[I]t remains ironic that a defendant in a breach of contract case  
can call on the power of the courts to compel third-parties to produce any documents ‘*reasonably*  
*calculated to lead to the discovery of admissible evidence*,’ . . . while a defendant on trial for his  
life or liberty does not even have the right to obtain documents ‘*material to his defense*’ from  
those same third-parties.”) (emphasis added)(citation omitted).

1           **B.       Letters Rogatory**

2           With respect to those materials Chamberlain seeks that are discoverable under Rule 17(c)  
3 and located abroad, the Court may issue letters rogatory to appropriate judicial authorities of the  
4 countries in question for assistance in gathering documents. *See United States v. Weisberg*, No.  
5 08-CR-347, 2010 WL 5027537, at \*2 (E.D.N.Y. Dec. 3, 2010). Letters rogatory are “the medium,  
6 in effect, whereby one country, speaking through one of its courts, requests another country, acting  
7 through its own courts . . . to assist the administration of justice in the former country.” *United*  
8 *States v. Al Fawwaz*, No. 98-cr-1023, 2014 WL 627083, at \*2 (S.D.N.Y. Feb. 18, 2014).

9           Federal courts have statutory authority to issue letters rogatory in both civil and criminal  
10 cases under 28 U.S.C. § 1781. *See United States v. Lee*, 723 F.3d 134, 142 n.6 (2d Cir. 2013).  
11 Federal courts also have inherent authority to issue letters rogatory. *See United States v. Staples*,  
12 256 F.2d 290, 292 (9th Cir. 1958); *United States v. Wedding*, No. 08-cr-2386, 2009 WL 1329146,  
13 at \*1 (S.D. Cal. May 13, 2009). The decision to issue letters rogatory lies within a court’s sound  
14 discretion. *Al Fawwaz*, 2014 WL 627083, at \*2. Requests for the issuance of letters rogatory are  
15 one of the “procedural tools” at the disposal of a criminal defendant to obtain evidence located in a  
16 foreign country. *See United States v. Yousef*, 327 F.3d 56, 112 & n.46 (2d Cir. 2003).

17           **V.       THE REQUESTED SUBPOENAS AND LETTERS ROGATORY MEET THE**  
18           **RELEVANT LEGAL STANDARDS**

19           Here, the records Chamberlain seeks are properly sought under Rule 17—and, for records  
20 located in a foreign country, via letters rogatory—because the elements of the *Nixon* test are  
21 satisfied: (i) the records are relevant, admissible, and specific evidence that is highly material to  
22 Chamberlain’s defense; (ii) Chamberlain cannot otherwise obtain the records in advance of trial,  
23 nor can he properly prepare for trial without obtaining the documents in advance of trial; and (iii)  
24 Chamberlain is making this application in good faith, not as part of a general “fishing expedition.”  
25 *See Nixon*, 418 U.S. at 699–700.

26           The government, HP, and the FRC each have relied heavily on the testimony of Khan and  
27 Morland to support the claim that the market was deceived by Autonomy’s alleged  
28 misrepresentations. Khan and Morland are expected to testify again in this trial about the same

1 topics: they will likely testify that they objectively followed Autonomy for many years and that  
2 Autonomy management misled market participants about Autonomy's revenues, products, and  
3 future anticipated growth.

4 The discovery pertaining to Khan and Morland shows that such testimony would be  
5 misleading and incomplete. In fact, it appears that Khan and Morland were not misled by  
6 Autonomy's financial disclosures. To the contrary, they were aligned with short seller clients and  
7 staked their professional prospects on driving down Autonomy's share price. And they engaged in  
8 this highly improper behavior not independently, but by cooperating and colluding with each  
9 other, and urging others to join their club. In short, while they repeatedly testified under oath that  
10 they were trustworthy, independent analysts, in fact Khan and Morland were determined to help  
11 drive down Autonomy's stock price. Their communications reveal a deep-seated animus toward  
12 Autonomy and its executives. The discovery materials show that Khan and Morland were far from  
13 disinterested, objective, and independent market observers diligently trying to analyze  
14 Autonomy's finances in aid of investors.

15 What defense counsel have seen thus far, however, appears to be only a sliver of Khan and  
16 Morland's relevant communications. For example, Morland's custodial documents are entirely  
17 missing from the government's production, as are communications from Khan's and Morland's  
18 other employers, communications between the two of them after February 2010, and all  
19 communications to or from their personal email handles.

20 Chamberlain needs these additional materials in advance of trial so that he can effectively  
21 prepare his defense and present a complete picture at trial about what Khan and Morland did—and  
22 actually knew—as analysts reporting on Autonomy. The additional materials will show that Khan  
23 and Morland's testimony does not prove that the conduct of Autonomy's management deceived  
24 anyone. Chamberlain has identified with specificity, based on a careful review of the materials he  
25 has received from the government thus far, a narrowly defined and tailored set of additional  
26 materials he seeks to ensure that he is able to effectively rebut the government's anticipated claim  
27 that the market was misled by any alleged misrepresentations by Autonomy.

28 The evidence sought is directly relevant to the elements of the allegations in the

1 indictment. Courts routinely grant Rule 17(c) subpoenas for materials in such circumstances, even  
 2 if those materials can also be used for impeachment. *See, e.g., United States v. Johnson*, No. 14-cr-  
 3 412, 2014 WL 6068089, at \*2 (N.D. Cal. Nov. 13, 2014); *United States v. Martinov*, No. 11-cr-  
 4 312, 2012 WL 3987329, at \*2 (N.D. Cal. Sept. 11, 2012). Here, the government appears poised to  
 5 repeat its incomplete and misleading presentation about what the market—and by extension, HP—  
 6 purportedly knew and did not know about Autonomy. Chamberlain is entitled to defend himself  
 7 against this presentation by demonstrating that the very analysts who claimed to be misled were,  
 8 in fact, not misled or defrauded by the financial statements and other information released by the  
 9 Defendants.

10 \* \* \*

11 For the foregoing reasons, Mr. Chamberlain respectfully requests that the Court issue the  
 12 subpoenas and letters rogatory attached as Exhibits 1 through 9 to the accompanying Declaration  
 13 of Gary S. Lincenberg.

14  
 15 DATED: November 1, 2021

Gary S. Lincenberg  
 Bird, Marella, Boxer, Wolpert, Nessim,  
 Drooks, Lincenberg & Rhow, P.C.

16  
 17  
 18 By:



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